Supreme Court, U.S.
FILED
SEP 25 1991
OFFICE OF THE CLERK

(3)

No. 91-281

In The

Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION FILED BY CITY OF OKLAHOMA CITY

*Steven M. Angel
Law Offices of Steven M. Angel
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

Carl D. Hughes
Hughes & Nelson
5801 N. Broadway Ext.
Suite 302
Oklahoma City, OK 73118
(405) 848-0111

Attorneys for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. The cross petition for writ of certiorari should not be granted inasmuch as the petition fails to raise issues which would justify the court exercising its discretion.

2. The cross petition for writ of certiorari should not be granted inasmuch as the petition raises issues not preserved below.

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A. Gramling, Chief of Police for the City of Oklahoma City; Gerald L. Emmett, Assistant Chief of Police for the City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to the City Manager, Defendants

Oklahoma Municipal League, Inc. amicus curiae[1]

---

[1] The corporations noted are public corporations with no known subsidiaries of which petitioner is aware.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 8

THE CROSS PETITIONER NEITHER PRESERVED ITS OBJECTIONS TO THE FIRST AMENDMENT CLAIM, NOR CITE ANY BASIS FOR THIS COURT GRANTING CERTIORARI 8

A. *Introduction* 8

B. *Issue Not Preserved Below* 10

C. *Balancing Test* 12

THE CROSS PETITION DOES NOT STATE A BASIS FOR CERTIORARI WITH RESPECT TO THE EMPLOYER'S BURDEN OF SHOWING INTERFERENCE 13

TABLE OF CONTENTS – Continued

Page

THE CROSS PETITIONER NEITHER PRESERVED ITS OBJECTIONS TO THE PROPERTY INTEREST CLAIM NOR CITE ANY BASIS FOR THIS COURT GRANTING CERTIORARI 14

A. *Failure to Preserve* 14

B. *Alleged Conflict* 15

THE CROSS PETITIONER FAILS TO STATE A BASIS FOR CERTIORARI ON THE ISSUE OF THE PROPERTY CLAIM 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Connick v. Myers, 461 U.S. 138 (1983) 8

Rankin v. McPearson, ___ U.S. ___, 107 S.Ct. 2891 (1987) 13

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 15

OTHER AUTHORITIES

First Amendment to the Constitution of the United States 2, 10, 12

Fourteenth Amendment to the Constitution of the United States 2, 3

28 U.S.C. Sec. 1254(1) 2

42 U.S.C. Sec. 1983 3

No. 91-281

In The

Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION FILED BY CITY OF OKLAHOMA CITY

Respondent herein, Raymon J. Melton[2], respectfully prays that the court deny the cross petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

[2] Petitioner in Case No. 91-29, and respondent in case nos. 91-280, 91-281, 91-304.

OPINIONS BELOW

The en banc opinion of the Tenth Circuit is reported at 928 F.2d 920[3]. This decision was entered after an order granting a hearing en banc on four (4) specific issues. This order is reported at 888 F.2d 724, and is set out at App. 50-52. The panel decision of the Tenth Circuit is reported at 879 F.2d 706 as *Melton v. City of Oklahoma City,* and is set out at App. pp. 53-136.

JURISDICTION

The decision of the Tenth Circuit was entered on March 1991. This court granted . extension to file the instant petition for writ of certiorari until July 2, 1991, on which date the petition was filed. The respondent filed it's cross petition for writ of certiorari on August 5, 1991. The corrected petition was received by the petitioners on August 26, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case involves the provisions of the First and 14th Amendments to the Constitution of the United States. The First Amendment provides:

---

[3] A copy of this opinion is included at App. 1 of Petitioner's Appendix to the petition in Case No. 91-29. Hereinafter, reference to the appendix to Case No. 91-29 shall be referred to as App. ___.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 14th Amendment provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions are implemented by 42 U.S.C. Sec. 1983 which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District or Columbia, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

As noted above, the cross-petitioner's application for a writ of certiorari is one of four pending cases. The factual background to this case is clearly set forth in the petition for certiorari filed by Raymon J. Melton in Case

No. 91-29. However, the cross-petitioner makes several erroneous statements of fact which must be addressed.

Apparently, at the heart of the cross-petition is the assertion that Raymon J. Melton had secretly recorded a conversation with a prosecutor while on duty.

As noted in the factual statement in No. 91-29, during the investigation and prosecution of William Page, the prosecutor, a United States Attorney named Wes Fredenburg, decided to interview R.J. Melton as a potential witness. Since Melton's name had come up during court authorized wire taps, Fredenburg considered Melton a "suspicious person". Fredenburg, recognizing the close relationship between Page and Melton wanted to interview Melton as a potential defense witness.

It is important to note that Melton was not involved in any fashion in the investigation of William Page. To the contrary, Melton was specifically excluded from the investigation. Thus, Melton's contact with Page arose simply because of his familiarity with the accused, and the chief witness for the prosecution[4].

In contacting Melton to request an interview, Fredenburg followed an unusual procedure. Fredenburg neither contacted Melton directly, nor sought permission through Melton's supervisor to interview him. Rather, Fredenburg had a personal friend, Maj. Marvin Maxwell, direct the attendance of Melton at the U.S. Attorney's office. This procedure caused Melton substantial concern inasmuch as he felt he had been under surveillance because of his

---

[4] Trial transcript pp. 325-328, 700-701.

connection with Page. In addition, rumors were circulating that a police officer would be indicted in connection with the Page case. Therefore, at the suggestion of his immediate supervisor, Melton decided to tape record the meeting with Fredenburg. This tape recording was to insure that he was not misquoted in any matter arising from this meeting[5].

Although the cross petitioners attempt on appeal to place some significance on the act of tape recording, the record at the trial level was clear that this was a common practice among police officers. That is, police officers routinely tape record meetings for their own protection[6]. Moreover, and more important, the defendants in this case each testified that *there was nothing improper in Melton making this tape recording*[7].

At the conclusion of this meeting, Fredenburg informed Melton that because of the information he had, he would most likely be called as a witness for the defense[8].

The information which Melton provided to the prosecution was not provided to the defense. Prior to the trial, the defense contacted Melton as a possible character witness. During the defense's pretrial preparation, they learned, for the first time, that Melton had provided

---

[5] See trial transcript pp. 104-113.

[6] Trial transcript p. 113.

[7] See trial transcript pp. 309, 317, 639, 690, 766.

[8] Trial transcript p. 118.

information to the prosecution which was exculpatory in nature, and related directly to the credibility of the prosecution's chief witness. Page's defense obtained a copy of the tape recording and, in conjunction with an affidavit, filed a motion to dismiss for failure to provide this information. This motion to dismiss was denied by the trial court. The basis for the denial was not that the material had not been *Brady* material. Rather, the basis was that the failure to disclose this material was not sufficient misconduct to justify a dismissal of the indictment.

Thereafter, the trial of William Page proceeded. Two police officers testified for the defense: Raymon J. Melton and Don Schimmels. Throughout the trial, the police department had assigned an observer, Major Marvin Maxwell. Immediately upon the verdict being rendered against Page, the cross petitioners began investigations on Melton and Schimmels. Melton was discharged and Schimmels was forced to resign.

At page 5 of the cross-petition it is stated that the interview took place while Melton was acting in the course of his duties as a police officer. This is a mischaracterization. As noted above, Melton had not been involved in any way in the investigation of William Page. This interview with Fredenburg was not part of any assignment he had as an Oklahoma City police officer. Rather, this interview was conducted simply because of his familiarity with the accused and the prosecution's chief witness.

At page 6 of the cross petition, it is repeatedly stated that this interview was "confidential". There is no evidence that either Melton or Fredenburg considered this

conversation "confidential". Rather, the cross petitioner's appear to be continuing to assert an unconstitutional rule that police officers may *never* cooperate with defense counsel[9].

Although cross petitioners now attempt to place great weight upon this tape recording, they did not urge it below. That is, as noted, at trial they admitted there was no reason to assert that tape recording was improper. Further, they neither objected to, nor submitted

---

[9] In this regard, Lloyd Gramling, the chief of police testified:

> Q. Now, is there a rule in the police department prohibiting officers from tape recording individuals?
>
> A. No. No.
>
> Q. Is there a rule that prohibits a police officer from cooperating with defense counsel?
>
> A. With some qualifications.
>
> * * * *
>
> Q. At what point can a police officer, as a private citizen, participate in defense without permission of a prosecutor and without permission of a –
>
> A. Well, never, if it is based upon his – the information he has gained in his official capacity.

Similarly, William Chambless, a member of the disciplinary review board testified that having talked to the prosecutor, the witness was precluded from revealing the substance of that conversation to defense, even for purposes of showing prosecutorial misconduct. Trial transcript p. 851.

instructions about, any assertion that tape recording of the prosecutor was a defense to plaintiff's actions[10].

REASONS FOR DENYING THE WRIT

THE CROSS PETITIONER NEITHER PRESERVED ITS OBJECTIONS TO THE FIRST AMENDMENT CLAIM, NOR CITE ANY BASIS FOR THIS COURT GRANTING CERTIORARI

A. Introduction

Cross Petitioner's first basis for their petition is that the lower courts had failed to properly address the issue of the balancing test under *Connick v. Myers*, 461 U.S. 138 (1983). In this regard, the Tenth Circuit[11] noted that while a governmental entity had an interest in intragovernmental cooperation, such interest did not outweigh the Plaintiff's interest in free speech. Thus, the court reasoned:

> [W]e are unpersuaded that the City's fundamental assumption – that any communication between law enforcement officials is by its very nature confidential – is correct. It is undisputed that neither Mr. Melton nor the City Police

---

[10] With respect to the proceedings set forth by defendant, they make an assertion as to the present status of the verdict that is not accurate. However, the exact status and amount of the verdict presently pending is not of such significance that it need be addressed in detail in the instant opposition.

[11] The Tenth Circuit addressed this issue in their panel decision. This rationale was not affected by the en banc decision.

Department participated in an official capacity in the Page investigation and prosecution; it was solely a federal matter. We view the communication between Mr. Melton and the prosecutor (which in turn was disclosed to Mr. Page's counsel) as one arising outside the scope of departmental confidentiality. The transcript of Mr. Melton's interview with the federal prosecutor clearly shows that the prosecutor interviewed Mr. Melton solely because he believed Mr. Melton would probably testify as a defense witness in the Page trial. Furthermore, while we are persuaded that at least some of the information which Mr. Melton possessed initially had been gained in the course of his official duties, the City did not focus on that fact in its confidentiality claim.

Under these circumstances, Mr. Melton's interest in this speech outweighs the City's interest in intradepartmental relations. He is under a high duty as a citizen to come forward with information relevant to a federal investigation and prosecution. In addition, Mr. Melton believed that the information he communicated to defense counsel was actual *Brady* material that he was under a duty to supply. Mr. Melton also indicated that he feared if he did not disclose this information, he would be implicated in Mr. Page's activity and possibly suffer prosecution as a result. As with his trial testimony, he believed he was disclosing exculpatory material at the request of defense counsel in a public investigation – information which the federal prosecutor did not otherwise disclose.

(App. pp. 67-68)

B. Issue Not Preserved Below

It must be highlighted that cross petitioner's assertion of a fundamental error below has not been adequately preserved. That is, prior to the trial of this matter, cross petitioner's never raised the assertion that either the tape recording was a basis for defeating Plaintiff's First Amendment claims nor that the Plaintiff's activity were not matters protected by the First Amendment[12]. That is, prior to trial, they did not *specifically* raise the issue by motion or answer. In the pretrial order, they merely asserted that "Plaintiff's termination was not based on the exercise of his constitutional rights". At trial, cross petitioners merely objected as follows:

---

[12] It must be noted that the district court did instruct the jury as to "confidentiality". Thus, the district court informed the jury as follows:

> Thus, the question of whether or not it was proper to let Judge Page's lawyers have the recorded conversation depends upon your determination of whether the information was confidential in nature or was confided to him in his official capacity. If you so find, then it was improper for plaintiff to give same to Judge Page's lawyers, and plaintiff could legally be fired to keep it secret, unless revelation of such information was necessary in the performance of his duties.
>
> On the other hand, if you find that the information was neither confidential in nature nor confided to him in his official capacity, or that revelation of the information was necessary in the performance of his duties, then the plaintiff could not be fired for failing to keep it secret.

(Continued on following page)

> Going to Instruction Number 5, Defendants, as a matter of law, object to the instruction. It fails to instruct regarding the balance test requirement under the Connic (phonetic) case. It fails to take into consideration the nature of public employment and a public employee's right to free speech.
>
> We feel that the arguments of the duty of every citizen to participate in the participation of – every citizen is an improper instruction and contrary to law and fails to take into consideration the nature of public employment.[13]

On appeal, the defendants merely asserted that the trial court had improperly instructed the jury with respect to the "balancing test".

The undersigned would urge that the cross petitioners are attempting to raise issues of law which they did not raise below. Rather, the Court of Appeals, as part of its responsibility to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression", succinctly addressed this issue.

(Continued from previous page)

Thus, cross petitioners, in urging the confidential nature of the disclosure are simply attempting to urge this court to determine, as a matter or law, that the information was confidential. The undersigned would submit that this is a question of fact which was decided by the jury.

[13] Trial Transcript pp. 1002-1004.

The undersigned would urge the court to deny the petition for certiorari on the basis that cross petitioner did not adequately preserve this below.

C. Balancing Test

In the event the court determines the cross petitioners did adequately preserve this issue, the undersigned would submit that they nonetheless do not assert any basis for granting the extraordinary writ. That is, cross petitioners assert that the decision below was contrary to the decisions of this court and other circuits in (a) determining that plaintiff Melton's activity was a "matter of public concern" and (b) determining that the employer's interest in intradepartmental cooperation was outweighed by the plaintiff's interest in free speech.

With respect to the former issue, the protected nature of the speech, cross petitioners appear to assert that it was not protected based upon a remark in the en banc decision, that the tape recording was for "personal" reasons. As noted above, the cross petitioners admitted at trial that there was nothing improper about tape recording. Rather, the issue concerns the disclosure to defense counsel. In this regard, the Tenth Circuit concluded that the disclosure of this information to defense counsel, and acting as a witness on this matter, was a matter of public concern protected by the First Amendment. While cross petitioners cite numerous cases reflecting the power of the public employer to restrict certain free speech activity, they do not cite a single case which suggests that truthfully disclosing material to the defense during a criminal

proceeding is unprotected activity[14]. Thus, cross petitioners fail to set forth any basis for this court granting certiorari.

THE CROSS PETITION DOES NOT STATE A BASIS FOR CERTIORARI WITH RESPECT TO THE EMPLOYER'S BURDEN OF SHOWING INTERFERENCE

Cross petitioner's next argument is that the Tenth Circuit improperly shifted the burden of demonstrating interference with the operation of government onto the defendant City.

In *Rankin v. McPhearson*, ___ U.S. ___, 107 S.Ct. 2891, 2899 (1987) this court, in addressing the factual matters which must be demonstrated noted that the "[employer]

---

[14] Indeed, as the Tenth Circuit noted at App. p. 62 this disclosure was certainly akin to protected whistle blowing activity, stating:

> Mr. Page was a public official under investigation and prosecution for malfeasance in his public duties. Of course, the public would want, and is arguably entitled to, information relating to a public official's guilt or innocence in a public trial which relates to his public duties. Additionally, Mr. Melton's speech was "calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of government officials in the conduct of their official duties", by revealing what he believed to be exculpatory Brady material to Mr. Page's defense counsel and the court – information which might otherwise have been suppressed by the federal prosecutor. [footnotes and citations omitted].

fails to demonstrate a state interest that outweighs McPhearson's First Amendment right".

While the Tenth Circuit did note that some circuits allowed a reasonable belief that disruption will occur as sufficient to meet the public employer's burden, the panel was careful to note that "None, however, accept purely speculative allegations. Here, the City made no showing of disruption or, for that matter, potential disruption; only a bald assertion that Mr. Melton's actions in communicating with Page's counsel implicated the City's confidentiality interests" (App. p. 67).

THE CROSS PETITIONER NEITHER PRESERVED ITS OBJECTIONS TO THE PROPERTY INTEREST CLAIM NOR CITE ANY BASIS FOR THIS COURT GRANTING CERTIORARI

A. Failure to Preserve

Cross petitioners assert that the determination of a property interest in continued employment was contrary to decisions of this court. However, as the Tenth Circuit noted, the "property interest" claim to a retirement benefit was not preserved below[15]. That is, cross petitioners

---

[15] At footnote 18, the Tenth Circuit noted:

> The City did not challenge the trial court's finding that Mr. Melton had a property interest in his status as a retired police officer. We do not disturb that finding on appeal.

neither asserted at trial, nor took any appeal, from the district court's determination that Melton had a property interest in his status as a retired police office. The undersigned would submit, therefore, the court should deny the cross petition for certiorari.

B. Alleged Conflict

Cross petitioner's assertion of a conflict with the decisions of this court is unsupported. That is, they can point to no law or case authority which supports their assertion that an individual does not enjoy a property right in the emoluments of his retirement status.

Indeed, cross petitioners cite as their authority *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The suggestion appears to be that the evidence did not show that the Plaintiff was entitled to his retirement status[16]. The undersigned would simply submit that *Roth*, specifically recognized that it was sufficient if the individual had a legitimate claim to entitlement. The court need not determine whether he was, in fact, entitled to the benefit. Thus, as explained in *Roth*:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent

---

[16] Contrary to this assertion, the undersigned would submit that the evidence showed that Raymon J. Melton was the *only* police officer ever denied the right to wear his uniform and carry his badge. This denial prevented him from obtaining outside employment as a security guard.

> source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly*, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

In this case, the statute cited provides Raymon Melton with a claim of entitlement. The due process hearing was to allow him to attempt to establish his right. As the Tenth Circuit noted, that is exactly what cross petitioner failed to allow.

Accordingly, the undersigned would submit that the cross petitioner has failed to state a basis upon which a writ of certiorari should be granted.

THE CROSS PETITIONER FAILS TO STATE A BASIS FOR CERTIORARI ON THE ISSUE OF THE PROPERTY CLAIM

As a final argument, the cross petitioners urge a right to petition on the issue of a property right in continued employment. Inasmuch as there is no authority or argument in support of such an assertion, it should be denied.

CONCLUSION

Based on the foregoing, the undersigned would respectfully submit that the cross petition for certiorari in this case should be denied.

Respectfully submitted,

*Steven M. Angel
Law Offices of Steven M. Angel
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

Carl D. Hughes
Hughes & Nelson
5801 N. Broadway Ext.
Suite 302
Oklahoma City, OK 73118
(405) 848-0111

Attorneys for Respondent

*Counsel of Record